BATHAMANI SUPPIAH

v.

SOUTHERN FINANCE COMPANY BHD

HIGH COURT MALAYA, IPOH
PS GILL J
[BANKRUPTCY NO: 29-349-98]
9 JULY 1999

BANKRUPTCY: *Capacity of bankrupt - Appeal, legal capacity to - Sanction of Official Assignee - Whether must be obtained first - Whether appeal or stay different from application to review, rescind, vary or annul bankruptcy order - Bankruptcy Act 1967, ss. 38(1)(a), 92(1) & 105(1)*

BANKRUPTCY: *Creditor's petition - Verifying affidavit - Affirmation - Whether affirmation must only be after filing and presentation of petition - Whether sufficient that petition was annexed to affidavit - Whether statements in petition verified as to their truth - Whether statements were before deponent when he swore affidavit - Bankruptcy Act 1967, s. 6(1) - Bankruptcy Rules 1969, r. 106 & Form 11*

BANKRUPTCY: *Creditor's petition - Misdescription of petition - Creditor's petition erroneously titled as creditor's application - Whether petition vitiated - Whether there was intention to mislead - Whether judgment debtor mislead - Whether a formal defect curable under s. 131 Bankruptcy Act 1967*

CIVIL PROCEDURE: *Affidavits - Requirements - Deponent's place of residence and occupation - Failure to state - Whether renders affidavit unusable in evidence - Rules of the High Court 1980, O. 41 rr. 1(4) & 4*

The principal issues emanating from the judgment debtor's instant appeal were whether the judgment debtor had the legal capacity to lodge the appeal, and whether the affidavit verifying the creditor's petition, having been affirmed before the presentation of the petition, was bad in law.

Held:

[1] Unlike an application to review, rescind, vary or annul a bankruptcy order, an appeal against a bankruptcy order or an application for a stay of proceedings can only be proceeded with the sanction of the Official Assignee. Consequently, the judgment debtor did not have the legal capacity to lodge the instant appeal.

[2a] The fact that the affidavit verifying the creditor's petition was affirmed before the petition itself was filed or presented did not render the affidavit or the petition bad. Neither the Bankruptcy Act 1967 ('the Act') nor the Bankruptcy Rules 1969 ('the Rules') stipulates that an affidavit verifying a creditor's petition must be affirmed after and not before the filing or presentation of the petition. Form 11 and r. 106 of the Rules read together with s. 6(1) of the Act only require the creditor's petition to be annexed (tied, affixed or stapled) to the verifying affidavit as was done here.

[2b] Essentially, it was the statements contained in the creditor's petition that were required to be verified as to their truth. As the statements in the petition were already before the deponent, and were within his knowledge, when he swore the affidavit, he must have sworn to the truth of the statements. There was thus no reason to reject the affidavit.

[3] The misdescription of the petition as a creditor's application (permohonan pemiutang) instead of a creditor's petition (petisyen pemiutang) did not vitiate the petition. Neither was there any intention to mislead nor was the judgment debtor mislead. It was a formal defect curable under s. 131 of the Act.

[4] Although the affidavit verifying the creditor's petition did not comply with O. 41 r. 1(4) of the Rules of the High Court 1980 ('the RHC') in that the deponent's place of residence and occupation were not stated, yet it was still usable in evidence pursuant to O. 41 r. 4 as the irregularity was merely in form.

[Judgment debtor's appeal dismissed.]

Case(s) referred to:
Ho Weng Keong [1992] 3 CLJ 1744 ***(foll)***
Khoo Kim Hock [1974] 2 MLJ 29 ***(refd)***
Low Kok Tuan, ex p Arab Malaysian Merchant Bank Bhd [1997] 4 CLJ 185 ***(foll)***
Ooi Thean Chuan v. Banque Nationale de Paris [1992] 2 CLJ 1225 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 6(1), 38(1)(a), 92(1), 105(1), 131
Bankruptcy Rules 1969, r. 106, Form 11
Rules of the High Court 1980, O. 41 rr. 1(4), 4

For the judgment debtor - Bachan Singh (Ms Brigitte with him); M/s Bachan & Kartar
For the judgment creditor - Fredrick I Nicholas; M/s Jeyaratnam & Chong

Reported by Alex KC Lee

JUDGMENT

PS Gill J:

At the outset I wish to make a pertinent observation of a point not canvassed by both the learned counsel for judgment debtor, or creditor, as to whether the judgment debtor had the legal capacity to appeal in the light of the fact that the learned registrar, had on 3 June 1999, made a receiving and adjudicating order against the said judgment debtor. In my judgment it is trite law, that upon a person being adjudged a bankrupt all his affairs are vested with the official assignee. I am mindful of the case of *Khoo Kim Hock* [1974] 2 MLJ 29 which merely says that the prohibition of s. 38(1)(a) Bankruptcy Act 1967 does not exclude a bankrupt from applying for a review, rescission, or variation of an order of bankruptcy under s. 92(1), or s. 105(1) Bankruptcy Act 1967, but the case is silent on the bankrupt's capacity to appeal, or for that matter to apply to stay proceedings, without the sanction of the official assignee. This issue was equally ventilated by my learned brother Dato' Low Hop Bing J in the case of *Low Kok Tuan ex-parte Arab Malaysia Merchant Bank Bhd* [1997] 4 CLJ 185. Like my brother judge I am equally of the view, that this deliberate omission by the legislature in regard to appeals or stay in s. 92(1) and s. 105(1) Bankruptcy Act, would mean only one thing, that unlike provisions for review, rescinding, varying or annulling a bankruptcy order, for purposes of appeal against a bankruptcy order, sanction of the official assignee should be obtained. That being the case, I hold for the present the appellant lacks the legal capacity to lodge the appeal.

Assuming I am wrong on this, the present appeal before me raises a perennial issue *vis a viz* whether affirming an affidavit verifying the creditor's petition before the filing, or presentation of the petition, rendered the creditor's petition invalid. This was to my mind the most crucial issue on appeal. This argument did not find favour with the learned registrar who had held that despite the fact that the affidavit verifying the petition was affirmed before the creditor's petition was filed, or presented, as long as the creditor's petition was attached, or bound to the affidavit, verifying the petition, when it was filed on 18 September 1998, there was no flaw in the affidavit, or the petition.

Briefly stated in these bankruptcy proceedings the creditor's petition was dated 29 August 1998 and the affidavit verifying this said petition was affirmed on the same day, ie, 29 August 1998. Both the petition and the affidavit, were presented to this court on 18 September 1998.

The main argument of the judgment debtor's counsel was that the affidavit verifying the petition was bad as it was sworn before the petition came into existence.

Section 6(1) of the Bankruptcy Act states 'A creditor's petition shall be verified by affidavit of the creditor or ...'. It is the statements contained in the petition that are required to be verified as to their truth. As I understand it, a deponent can only depose as to the truth of the facts that are existing or have existed. Now the facts on statements in the present petition were dated 29 August 1998 and the affidavit verifying those facts is also dated the same date, and one of its paragraph is worthy of reproduction "Bahawa tiap-tiap satu pernyataan dalam permohonan tersebut adalah benar pada pengetahuan saya sendiri". It cannot be gainsaid that all the statements were already before the deponent at the time when he affirmed the affidavit.

On a scrutiny of the Bankruptcy Act or the rules, nowhere is it stated that the affidavit verifying the petition must be affirmed after the filing or presentation of a petition. If in every case, the Bankruptcy Rules or Act demand that the affidavit shall be affirmed and filed only after the presentation of the creditor's petition, then it shall be so stated. The language in Form 11 read together with s. 6(1) of the Bankruptcy Act 1967 and r. 106, clearly shows that the petition has to be annexed to the verifying affidavit; the petition must be tied to or affixed to, or stapled to the verifying affidavit, so as to avoid dispute as to what is exactly been verified. I have every reason to believe and neither was it ever contested that both the petition and the verifying affidavit were affixed to each other, and presented for filing on the same day, which is on 18 September 1998. To this extent I agree with the view of Edgar Joseph Jr J (as he then was) in *Ooi Thean Chuan v. Banque Nationale de Paris* [1992] 2 CLJ 1225; [1992] 2 MLJ 526 that, for presentation of the petition, the petition has to be annexed to the verifying affidavit.

On the facts of the case before me, it was the judgment debtor's counsel submission that the affidavit verifying the petition has no effect and cannot verify the creditor's petition, notwithstanding the fact, that those statements had presumably been placed before the deponent, and were within his knowledge before he swore the affidavit. To my mind if those statements had been placed before the deponent and were within his knowledge before he swore the affidavit, surely, he must have sworn to the truth and therefore there was absolutely no reason for refusing to accept the affidavit. At the risk of repetition, since both the petition and the affidavit are together before the court, there is in my view no flaw in the affidavit. As

such, to quote an extract from Lamin J (as he then was) in the *Ho Weng Keong* [1992] 3 CLJ 1744; [1993] 1 MLJ 63, "I am not prepared to take the life of this newly born babe, the petition, by striking it out on the ground that its apparent life support system, the affidavit, has been alleged to be technically faulty."

As a precautionary measure, despite my ruling that the affidavit verifying the petition was valid in law, I had ruled that a second verifying affidavit should be filed to correct if at all there were any infirmities in the first affidavit verifying the petition.

For these reasons I dismissed this submission of the judgment debtor counsel.

The judgment debtor's counsel had also raised the fact that the creditor's petition, was described in Malay, *vide* encl. 5, as 'permohonan pemiutang', when in fact the proper interpretation should have been 'petisyen pemiutang.' This may be so, but I held that it did not in anyway vitiate the creditor's petition, as there was no intention to mislead and the judgment debtor was not in fact mislead by this misdescription. At most, I consider this defect to be a formal defect and by the provisions of s. 131 Bankruptcy Act the said proceedings are not invalidated by this defect.

Judgment debtor's counsel, had also raised the issue, that the deponent of the affidavit verifying the petition, *vide* encl. 4, had not complied with O. 41 r. 1(4) of the Rules of the High Court 1980, in that, he had not stated the place of his residence and his occupation in the said affidavit. To this argument I am of the view that despite the fact that there may be an apparent defect to the said affidavit, I had pursuant to O. 41 r. 4 Rules of the High Court 1980 allowed the affidavit in, as it was an irregularity in form only.

For these reasons I dismissed the appeal and confirmed the adjudicating and receiving order made against the bankrupt.